IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Leslie Equipment Company, a West Virginia corporation, Plaintiff Below, Appellee

vs.) No. 34712

Wood Resources Company, L.L.C., Christopher Todd Zach, individually and d/b/a/ Wood Resources Company, L.L.C., Ramona C. Goeke, individually and d/b/a Wood Resources Company, L.L.C., and Wendell L. Koprek, individually and d/b/a/ Wood Resources Company, L.L.C., Defendants Below

Christopher Todd Zach and Ramona C. Goeke, Appellants

REPLY BRIEF OF APPELLANTS CHRISTOPHER TODD ZACH and RAMONA C. GOEKE

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I. INTRODUCTION

In its Brief,[1] the Appellee asserts that its attempts at constructive service, pursuant to *West Virginia Rules of Civil Procedure*, Rule 4(e)(2), was sufficient to obtain *in personam* jurisdiction over the Appellants, Christopher Todd Zach and Ramona C. Goeke. In making this claim, the Appellee seems to insist that the constructive service provided by Rule 4(e)(2) is "essentially" the same for purposes of asserting *in personam* jurisdiction as the West Virginia's "long arm" statute applicable to individuals, W. Va. Code § 56-3-33, and that a West Virginia Circuit Clerk can accept service of process in the same manner as the West Virginia Secretary of State.

The Appellee supports its claim by citing three inapplicable domestic relations cases and contends that the Court cannot consider some jurisdictional arguments presented in the Appellants' Brief, claiming that the arguments were not raised before the trial court. The Appellee does not dispute several important conclusions contained in the Appellants' brief, namely: that an default judgment obtained in the absence of *in personam* jurisdiction is void; that a "reasonable time" test is to be applied when reviewing a motion to set aside a default judgment; and that the Appellants' Motion to Set Aside was filed with the trial court within a reasonable time of learning of entry of the default judgment against them.

This Response will demonstrate the the Appellee's arguments ignore cases squarely addressing the issue of West Virginia courts asserting *in personam* jurisdiction over a nonresident defendant in a civil lawsuit and, in the absence of supporting case law,

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1 The Appellee did not provide a date of service of its unsigned Brief on the Certificate of Service it filed. Undersigned counsel received Appellee's Brief on April 1, 2009. Therefore, this Reply is filed within fifteen (15) days of receipt of such Brief, in accordance with the Order of this Court and *West Virginia Rules of Appellate Procedure*, Rule 6.

advance a theory of the *West Virginia Rules of Civil Procedure* providing an independent basis for the assertion of *in personam* jurisdiction over a nonresident defendant by West Virginia courts. The Appellee, thus, offers nothing to question the statement of law advanced in the Appellants' Brief, and provides no basis for denying Mr. Zach and Ms. Goeke their requested relief.

II. THE CIRCUIT COURT OF WIRT COUNTY DID NOT HAVE *IN PERSONAM* JURISDICTION OVER MR. ZACH AND MS. GOEKE IN THE UNDERLYING ACTION

A. The Appellee's Attempt at Constructive Service Pursuant to WVRCP, Rule 4(e)(2), Did not Confer *In Personam* Jurisdiction over Mr. Zach and Ms. Goeke

The Appellee's argument seems to rest primarily upon deducing from the fact that, since WVRCP, Rule 4(e)(2) provides for constructive service upon a nonresident defendant, it can automatically be concluded that service conducted pursuant to this section is sufficient to confer *in personam* jurisdiction over a nonresident. The Appellee's deduction fails for four main reasons: (1) the *West Virginia Rules of Civil Procedure* does not, in itself, provide a basis for *in personam* jurisdiction, with such basis to be provided by statutory and/or case law; (2) constructive service cannot provide *in personam* jurisdiction over a nonresident defendant; (3) WVRCP, Rule 4(e)(2), by its own definition, is not available to Appellee as a means of service upon Mr. Zach and Ms. Goeke, as in the underlying action the Appellants had, in the West Virginia Secretary of State, a statutory attorney upon whom service in the State could be had; and (4) service upon Mr. Zach and Ms. Goeke pursuant to WVRCP, Rule 4(e)(2) never occurred.

B. *West Virginia Rules of Civil Procedure* Provides No Independent Basis for Jurisdiction

West Virginia Rules of Civil Procedure, Rule 82 expressly states that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts or the venue of actions therein." Reference to a section contained in WVRCP, Rule 4, thus, is of no help is determining whether a court has obtained *in personam* jurisdiction over a nonresident defendant in a particular action, as determination of such can only be made by consulting relevant statutory or case law.

C. *In Personam* Jurisdiction over a Nonresident Defendant Cannot be Obtained by Constructive Service

In this matter, the Appellee declines to cite any statute or case law in support of its contention that a West Virginia court can assert *in personam* jurisdiction over a nonresident defendant through constructive service and, more specifically, that *in personam* jurisdiction may be obtained over a nonresident defendant by service conducted pursuant to WVRCP, Rule 4(e)(2). The Appellee's Brief fails to counter case law unequivocally standing for the fact that *in personam* jurisdiction cannot be obtained over a nonresident defendant through constructive service. As is more fully described in the Appellants' Brief, the West Virginia Court has cited, with approval, the determination of the United States District Court for the Northern District of West Virginia, that "[n]o statute or rule of the State of West Virginia,....provides that in personam jurisdiction can be had over a non-resident served outside of the state." Fabian v. Kennedy, 333 F. Supp. 1001, 1005 (N.D. W. Va. 1971)(*cited by*, McClay v. Mid-Country Magazine, 190 W. Va. 42, 435 S.E.2d 180 (fn. 4) (1993), *see also*, Central Operating v. Utility Workers of America, 491 F.2d 245, 251 (4th Cir. 1974), *citing* Fabian, 333 F. Supp. 1001 ("Under

West Virginia law, a judgment that operates *in personam* cannot be rendered against a defendant upon whom only constructive service has been executed."), Barnes v. International Amateur Athletic Fed'n, 862 F. Supp. 1537, 1541 (S.D. W. Va. 1993)(finding dismissal to be mandatory where only constructive service is obtained in an action requiring *in personam* jurisdiction), *citing*, Teachout v. Larry Sherman's Bakery, Inc., 158 W. Va. 1020, 1022, 216 S.E.2d 889, 891 (1975)("recognizing well-established rule that service of process outside state on nonresident defendant does not confer personal jurisdiction over the defendant").

In making its case that constructive service is sufficient for *in personam* jurisdiction to be obtained over a nonresident defendant (without ever identifying the type of service it utilized as "constructive") the Appellee asserts that "[p]ersonal jurisdiction is not the product of a method of service of process," Appellee's Brief p.8, and that Mr. Zach and Ms. Goeke's appeal is primarily based upon an argument "that somehow, certified mail from the Circuit Clerk of Wirt County is inferior to certified mail from the Secretary of State of West Virginia." *Id.* at 6. These contentions seek to evade the issues involved in Mr. Zach and Ms. Goeke's appeal, and ignore important pronouncements from this Court and the West Virginia legislature.

As to the Appellee's first contention, describing jurisdiction as a "product" of service is overly simplistic, as doing so ignores the contacts with the forum state and due process considerations paramount for a court to obtain *in personam* jurisdiction over a nonresident defendant. *See*, Syl. Pt. 1 Easterling v. American Optical Corp., 207 W. Va. 123, 529 S.E.2d 588 (2000)(describing two-prong test for jurisdiction of: (1) satisfying general, W. Va. Code § 56-3-33, or corporate, W. Va. Code § 31-1-15, "long arm" statute;

and (2) satisfying federal due process concerns).

This Court has stated that "[s]ervice of process is the 'physical means by which jurisdiction is asserted.'" McClay, 190 W. Va. at 44, 435 S.E.2d at 182, *quoting*, Terry v. Raymond International, Inc., 658 F.2d 398 (5th Cir. 1981). Therefore, as more fully detailed in the Appellants' Brief, in a case for damages against an individual nonresident defendant, here must be the presence of one of the acts specified by W. Va. Code § 56-3-33, contacts sufficient to satisfy due process requirements, and service of process in the manner specified by W. Va. Code § 56-3-33 in order for *in personam* jurisdiction to be asserted over the nonresident by a West Virginia court. *See*, McClay v. Mid-Atlantic Country Magazine, 190 W. Va. 42, 47-48, 435 S.E.2d 180, 185-86 (noting a "general principle that where a particular method of serving process is prescribed by statute that method must be followed"). The Appellee's argument conflicts with prior case law and attempts to make irrelevant both the importance of service in acquiring *in personam* jurisdiction over a nonresident defendant, and the standing of W. Va. Code § 56-3-33 and other West Virginia "long arm" statutes.[2]

D. A West Virginia Circuit Clerk is not Authorized to Accept Service of Process

The Appellee's contention that the constructive service it attempted is indistinguishable from the service provided by W. Va. Code § 56-3-33, based upon certified mail being utilized by each, fails to understand the process by which jurisdiction over a nonresident defendant is obtained by the State's "long arm" statute. The Appellee's argument focuses on that fact that both forms of service utilize certified mail, and questions whether one form of service is "inferior" to the other. This argument ignores the

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2 See, W. Va. Code § 56-3-31 (auto accidents involving a nonresident); W. Va. Code § 31D-15-1510 (foreign corporations); W. Va. Code § 56-3-34 (nonresident bail bondsman).

distinction of a West Virginia Circuit Clerk not being authorized, by statute, rule or otherwise, to accept service for any defendant, while, pursuant to W. Va. Code § 56-3-33, when a nonresident defendant engages in one of the seven acts listed by the Code section, the West Virginia Secretary of State is appointed as the nonresident's statutory attorney, upon whom services of process may be had. W. Va. Code § 56-3-33(a). Pursuant to W. Va. Code § 56-3-33, the certified mail sent by the Secretary of State to the nonresident is *delivery* of service of process, after the nonresident has already been served within the State of West Virginia, *See* W. Va. Code § 56-3-33(a), (c). By contrast, under the method of service selected by the Appellee, no service of process within the State occurs, with the nonresident receiving only constructive service, insufficient for a West Virginia court to assert *in personam* jurisdiction over the nonresident.

E. The Appellee Fails to Distinguish Cases Cited by the Appellants and Supports its Argument with Cases not Addressing the Issue on Appeal

The Appellee fails to distinguish cases cited in Mr. Zach and Ms. Goeke's Brief, and counters these with three wholly inapplicable domestic relations cases. It claims that Fabian v. Kennedy, 333 F. Supp. 1001 is too factually dissimilar to guide the Court in deciding the present action, apparently based upon the fact that other issues were decided by the Northern District court in that case. The Appellee's concerns ignore the fact that the Northern District clearly ruled that, under West Virginia law, *in personam* jurisdiction was not established by the constructive service chosen by the plaintiff, by having a defendant personally served outside of the State of West Virginia. The remaining issues listed by the Appellee do not detract from the Northern District's ruling on West Virginia's law regarding constructive service.

Similarly, the Appellee's attempt at reducing the precedential effect of Teachout, 158 W. Va. 1020, 216 S.E.2d 889, is also unconvincing. The Appellee claims that *Teachout* is inapplicable because that case "addresses whether a nonresident co-defendant could be could be served by publication, in order to obtain personal jurisdiction over him." Appellee's Brief p.9. This reading ignores the fact that in that case, the plaintiff had attempted to serve the individual, nonresident defendant both by publication, and by mailing a copy of the summons and complaint to his Ohio residence. Teachout, 158 W. Va. at 1021. The Court concluded, without discussion, that neither manner of service was sufficient for the West Virginia court to assert *in personam* jurisdiction over the nonresident. The only remaining issue to be decided by the *Teachout* Court was whether the nonresident had waived his right to challenge the court's jurisdiction by participating in proceedings through to trial.[3] The most important aspect of *Teachout* for the present proceeding is the fact that the Court found the issue of service by mail and by publication being insufficient to obtain *in personam* jurisdiction over a nonresident defendant to be so well established, that elaboration on this subject by the Court was not necessary.

The Appellee also attempts to claim that McClay, 190 W. Va. 42, 435 S.E.2d 180, *infra.*, is inapplicable because it involved a nonresident corporation. Appellee's Brief p.9. In a fact pattern similar to that occurring in *Teachout*, the plaintiff attempted to serve the nonresident defendant by mail at the defendant's foreign headquarters and by another means equally insufficient to assert *in personam* jurisdiction over the nonresident (on an attorney not authorized to accept service of process). McClay 190 W. Va. at 43-44. The *McClay* Court came to the same determination as the *Teachout* Court, in finding that

3 The *Teachout* Court ruled that the general/special appearance distinction had been eliminated, and that a defendant timely raising a challenge to the court's jurisdiction could participate in proceedings through to trial without waiving such jurisdictional challenge.

service by mail was not sufficient to establish *in personam* jurisdiction over the nonresident. The precedential value of *McClay* to the present action is not diminished by the fact that *McClay* involved a corporate defendant, as the manner of service provided by West Virginia's general "long arm" is the same as that provided by the "long arm" statute reserved for corporate defendants in effect at the time. *Compare*, W. Va. Code § 56-3-33, *with* W. Va. Code § 31-1-15 (1988)(*repealed*).[4] Furthermore, W. Va. Code § 56-3-33 is broadly drawn, being applicable to nonresident corporations as well as individuals. *Id.* at (e)(2). Therefore, any ruling by this Court finding a lack of jurisdiction over a foreign corporate defendant, based upon the plaintiff's failure to serve the defendant within the parameters of the previous "long arm" statute reserved for corporations, W. Va. Code § 31-1-15(*repealed*), would have precedential value in a subsequent action where, as is the case in the present appeal, the issue before the Court is whether a court lacked *in personam* jurisdiction over a nonresident, individual defendant, based upon a plaintiff's failure to serve such defendant in accordance with the State's general "long arm" statute, W. Va. Code § 56-3-33.

In urging the Court to ignore the cases noted above, which directly address the issue of service on a nonresident defendant in an action for damages, the Appellee instead presents as controlling in the issue involved in this appeal, three domestic relations cases, Pries v. Watt, 186 W. Va. 49, 410 S.E.2d 285 (1991), Snider v. Snider, 209 W. Va. 771, 551 S.E.2d 693 (2001), Lemley v. Barr, 176 W. Va. 378, 343 S.E.2d 101 (1986), Appellee's Brief pp.6-9, which fail completely to address the issues at hand in this matter.

4 W. Va. Code § 31-1-15 was replaced in 2002 by W. Va. Code § 31D-15-1510, which provides additional means of service upon foreign corporations..

In the former two actions, for reasons of the fact patterns presented by the cases, the Court was only required to apply a Fourteenth Amendment Due Process test, in deciding whether *in personam* jurisdiction existed over a nonresident. *See*, Syl. pt. 2, Pries, 186 W. Va. 49, 410 S.E.2d 286, Syl. pt. 2, Snider, 209 W. Va. 771, 551 S.E.2d 693, *citing*, International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154 (1945). The *Pries* Court considered an attempt by the plaintiff to modify a New Jersey spousal support order in the West Virginia courts, and determined that the party seeking a writ of prohibition had insufficient contacts with West Virginia for the West Virginia court to exercise such jurisdiction. *See generally*, Pries, 186 W. Va. 49, 410 S.E.2d 286.

The *Snider* Court was presented with an argument whereby the appellant claimed that an order entered by an Illinois court, granting a divorce without ordering a division of marital property, extinguished the ability of a West Virginia court to exercise personal jurisdiction and subject matter jurisdiction over the appellant in regards to a division of the parties' marital property, including marital property located within the State of West Virginia. Snider, 209 W. Va. 772-74. In this case, the Court found that the exercise of *in personam* jurisdiction over the appellant did not violate the Due Process Clause. Based upon the facts present in the respective cases, neither the *Pries* not *Snider* Courts needed to extend their discussion beyond a Fourteenth Amendment Due Process analysis and, thus, did not touch upon the issues at hand in this appeal.

F. The West Virginia Court Recognizes a Two-Prong Approach to Determining Whether *In Personam* Jurisdiction Exists over a Nonresident Defendants

The Appellee would have the Court believe that *Pries* and *Snider* supplant *Teachout*, *McClay* and other cases involving jurisdiction over nonresident defendants in actions for damages. This contention is belied by the fact that *McClay* was decided after

Pries and before *Snider*, and the Court makes no mention either of *McClay* overruling *Pries*, or of *Snider* overruling *McClay*. In fact, neither case mentions the earlier decided action. It is, thus, clear that the Court considered fact patterns contained in the domestic relations cited by the Appellee in a different vein from those involving issues of service upon a nonresident defendant or application of a "long arm" statute.

The *International Shoe Co.* Due Process test, cited by *Pries* and *Snider* represents only one (and not even the initial) consideration in determining whether a West Virginia court may exercise *in personam* jurisdiction over a nonresident defendant. As previously discussed, the Court has stated that:

> A court must use a two-step approach when analyzing whether personal jurisdiction exists over a foreign corporation or other nonresident. The first step involves determining whether the defendant's actions satisfy our personal jurisdiction statutes set forth in *W. Va. Code*, 31-1-15 (1996) *[now W. Va. Code § 31D-15-1510]* and *W. Va. Code*, 56-3-33 (1996). The second step involves determining whether the defendant's contacts with the forum state satisfy federal due process. Syl. pt. 1, Easterling, 207 W. Va. 123, 529 S.E.2d 588, *infra.*, Syl. pt. 5, Abbot v. Owens-Corning Fiberglass Corp., 191 W. Va. 198, 444 S.E.2d 285 (1995).

The Appellee's apparent contention that the Due Process test represents the sole consideration when determining whether *in personam* jurisdiction exists over a nonresident defendant ignores the first prong of the inquiry established by this Court, and renders W. Va. Code § 56-3-33 a nullity This is in direct conflict with the intent of the West Virginia legislature, which has enacted legislation demanding service upon a nonresident defendant in the State, either personally, or upon the Secretary of State or other attorney-in-fact, as a prerequisite to the State's courts exerting *in personam* over the nonresident. The Appellee's reading is, similarly, in conflict with prior decisions on West

Virginia's law, which have affirmed the necessity of following requirements of the State's "long arm" statutes, in cases where *in personam* jurisdiction over a nonresident defendant is sought, in the absence of personal service within the State. *See generally,* McClay, 190 W. Va. at 47-48, 435 S.E.2d at 185-86, *infra.*

G. A Third Case Cited by the Appellee, Ruling on the Jurisdiction of an Ohio Court, Does Nothing to Advance Discussion of the Issue Involved in this Appeal

Lemley v. Barr, 176 W. Va. 378, 343 S.E.2d 101, *infra.*, the third case introduced by the Appellee in support of its argument that the State's "long arm" statutes should be considered effectively irrelevant in determining whether *in personam* jurisdiction exists over a nonresident defendant, is further removed from the facts and issues involved in the present action than the *Pries* and *Snider* decisions previously cited. The question before the *Lemley* Court was whether an Ohio court had jurisdiction to enter an order invalidating the adoption of a child born to a minor in Ohio and adopted by parties in West Virginia, thus, entitling such order to the same force and effect in West Virginia courts under the Full Faith and Credit Clause.[5] *See generally, Id.*

The decision of the *Lemley* Court, finding the Ohio court to have such jurisdiction, was based upon application of Ohio law. *Id.* at 382-84. Furthermore, the West Virginia Court found that the Barrs, appellees in that action, had appeared in the Ohio court, without challenging the court's jurisdiction over them, through their attorneys invoking attorney-client privilege in refusing to divulge the identity of their clients. *Id.* at 384. The *Lemley* decision, thus, does not touch upon the issue of the jurisdiction of West

5 "Under article IV, § 1, of the Constitution *of the United States*, a valid judgment of a court of another state is entitled to full faith and credit in the courts of this state, Syl. pt. 1, Lynn v. Eddy, 152 W. Va. 345, 163 S.E.2d 472 (1968), Syl. pt. 1, Lemley v. Barr, 176 W. Va. 378, 343 S.E.2d 101, unless such judgment is successfully attacked on jurisdictional grounds. Lynn, 152 W. Va. 345, 163 S.E.2d 472 at Syl. pt. 2, Lemley, 176 W. Va. 378, 343 S.E.2d 101 at Syl. pt. 2, Syl. pt. 4, Brady v. Brady, 151 W. Va. 900, 158 S.E.2d 359 (1967).

Virginia courts over nonresident defendants, and offers nothing to guide the Court in determining the controversy presented in this appeal.

H. The Appellee Does not Contest the Unavailability and Ineffectiveness of the Method of Service it Selected

The Appellee offers nothing to dispute arguments present in Mr. Zach and Ms. Goeke's Brief that: (1) the method of constructive service chosen by the Appellee to serve Mr. Zach and Ms. Goeke, under WVRCP, Rule 4(e)(2), was not available to the Appellee in this action as, assuming that Mr. Zach and Ms. Goeke had the type and manner of contacts with West Virginia sufficient to pass Due Process analysis and invoke the State's "long arm" statute, W. Va. Code § 56-3-33, Zach and Goeke would have, pursuant to W. Va. Code § 56-3-33, an statutory attorney upon whom service could be had in this State; and (2), that the Appellee did not follow the dictates of WVRCP, Rule 4(e)(2), by attempting to have Mr. Zach and Ms. Goeke served by certified mail that was not restricted to the addressee. [6]

Instead, the Appellee disputes the ability of the Court to consider the failure of the Appellee to obtain jurisdiction over Mr. Zach and Ms. Goeke for these reasons, contending that these "arguments....were not raised in the trial court." In support of its claim, the Appellee cites Mayhew v. Mayhew, 205 W. Va. 490, 519 S.E.2d 188 (1999), in which the Court ruled that, in an appeal regarding the valuation and status of stocks alleged to be marital property, it would not consider an appeal of an alimony award that apparently was not raised at the trial court, *Id.* at 494, and State v. Bosley, 159 W. Va. 67, 218 S.E.2d 894 (1975), in which the Court ruled that it would not consider an appeal

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6 WVRCP, Rule 4(e)(2) calls for service "by the method set forth in Rule for (d)(1)(D)," which is effected by "[t]he clerk sending a copy of the summons and complaint to the individual to be served by certified mail, return receipt requested, *and delivery restricted to the addressee.*" WVRCP, Rule 4(d)(1)(D)(*emphasis added*).

based upon the propriety of remarks made by the prosecuting attorney in his closing arguments, because no record of such closing arguments had been made. *Id.* at 72.

The Appellee's contention fails for several reasons. First, the entire focus of Mr. Zach and Ms. Goeke's appeal is based upon the fact that the Circuit Court of Wirt County lacked *in personam* jurisdiction over the Appellants and that, therefore, the judgment was void and should be set aside, and the case against them dismissed for said lack of jurisdiction. All arguments cited by the Appellee, thus, go directly to the central issue of Mr. Zach and Ms. Goeke's pleadings before the Wirt County court. The Appellee fails to cite any case standing for the proposition that a party is required to expend at trial every conceivable argument supporting a single central issue, in order to preserve each argument on appeal. The only case even remotely touching on this contention cited by the Appellee concerned such vastly disparate issues as spousal support and the valuation of potential marital property, *See*, Mayhew, 205 W. Va. at 494, 519 S.E.2d at 192, *infra.*, each of which would clearly have to be individually preserved at the trial court. Additionally, this Court has ruled that jurisdictional arguments may be raised for the first time on appeal, and may even be considered *sua sponte* by the Court. Syl. pt. 6, Hammond v. Worrell, 144 W. Va. 83, 106 S.E.2d 521 (1958)("Lack of jurisdiction may be raised for the first time in this court,***** and may be taken notice of by this court on its own motion.") Easterling, 207 W. Va. at 132. The Appellee's objection as to whether jurisdictional arguments raised by Mr. Zach and Ms. Goeke on appeal were properly preserved at trial court is, thus, immaterial.

Mr. Zach and Ms. Goeke's arguments concerning the unavailability of the method of service selected by the Appellee, and the deficient manner in which such service was

performed could also be considered by the Court on its own motion under the "plain error" doctrine. "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. pt. 4, Voelker v. Frederick Business Properties, 195 W. Va. 246, 465 S.E.2d 246 (1995), Syl. pt. 7, State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995). In elaborating on this test, the Court has stated "that when determining whether the error in plain we look to see if the error is clear or obvious. If the error is clear or obvious, then it must affect substantial rights. In other words, it must be prejudicial, affecting the outcome of the case." Voelker, 195 W. Va. at 254 (internal citations omitted).

Both the Appellee's choice of method of service and the manner in which such service was conducted would fall under the "plain error" doctrine. The fact that the Secretary of State was available for service as the Appellants' statutory attorney in the case that the Appellee had any type of action for which *in personam* jurisdiction was required is clear and obvious, as is the fact that the Appellee failed to restrict service of process to the addressee in its attempts at serving each Appellant, as required by WVRCP, Rule 4(e)(2). Both are obvious errors which substantially prejudices the rights of the Appellants, by subjecting them to the judgment of a court lacking jurisdiction over their person. For the same reason, the integrity of the court is compromised where judgment is entered against a party in the absence of jurisdiction.

III. CONCLUSION

The Appellee does nothing to call into question the arguments presented in the Brief filed by Mr. Zach and Ms. Goeke. The main arguments forwarded by the Appellee

are: that the Court has adopted *the International Shoe Co.* Due Process test as the sole measure for evaluating whether *in personam jurisdiction* exists over a nonresident in an action for damages, effectively invalidating the State's "long arm" statutes and cases deciding issues based upon such statutes; and that the Court is not permitted to entertain certain jurisdictional arguments, which the Appellee claims were not adequately raised at trial court. Both contentions are clearly at odds with the prior decisions of this Court.

The remaining arguments in the Brief filed by Mr. Zach and Ms. Goeke: (1) that a judgment entered in the absence of *in personam* jurisdiction is void; (2) that a motion to set aside a void judgment is evaluated under the "reasonable time" test; and (3) that the motion to set aside filed by Mr. Zach and Ms. Goeke was filed within a reasonable time of learning of the entry of such default judgment, are not disputed in the Appellee's Brief. Mr. Zach and Ms. Goeke, thus, are entitled to the relief requested in their Brief.

WHEREFORE, Mr. Zach and Ms. Goeke pray that this Honorable Court grants them the relief requested in their brief, by reversing the order of the Wirt County Circuit Court and dismissing the action against them.

RESPECTFULLY SUBMITTED
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Christopher Todd Zach and Ramona C. Goeke, Appellants

CERTIFICATE OF SERVICE

I, P. Todd Phillips, counsel for the Appellants, Christopher Todd Zach and Ramona C. Goeke, certify that on the 16th day of April, 2009, I served the foregoing **Reply Brief of Appellants Christopher Todd Zach and Ramona C. Goeke** upon the parties listed below by placing true and correct copies thereof in the United States mail for delivery, First Class, postage prepaid, addressed as follows:

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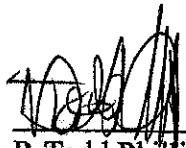

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